

Denver Journal of International Law & Policy

Volume 44
Number 3 *48th Annual Sutton Colloquium*

Article 6

April 2020

Community Development Agreements in Mining Projects

Kristi Disney Bruckner

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

Recommended Citation

Kristi Disney Bruckner, Community Development Agreements in Mining Projects, 44 Denv. J. Int'l L. & Pol'y 413 (2016).

This Article is brought to you for free and open access by Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

COMMUNITY DEVELOPMENT AGREEMENTS IN MINING PROJECTS

KRISTI DISNEY BRUCKNER*

I. INTRODUCTION

In a world where there is a limited quantity of nonrenewable mineral resources, a rapidly growing population, and an escalating demand for resources, the dynamics between mineral developers and communities are changing. While the need for developers to understand and address project impacts on communities is nothing new, the increasing demands of international and domestic law and policy frameworks; the advanced level of organization of communities on local and global levels to demand their rights; and the expanding company adoption of voluntary standards and commitments to communities has shifted the expectations of the company-community relationship. One outcome of these changing dynamics is the increased use of Community Development Agreements (“CDAs”) between companies and communities that govern various aspects of the impacts and benefits of natural resource development projects.¹

CDAs are a valuable tool for developing and maintaining positive company-community relationships through effective two-way communication and increased community participation throughout the life of a development project.² Parties use mechanisms established in one or more CDAs not only for improved communications and transparency, but also to avoid or mitigate negative project

* Kristi Disney Bruckner is the Executive Director of Sustainable Development Strategies Group (“SDSG”), a Colorado, U.S.-based nonprofit organization that works internationally to develop collaborative policy and legal frameworks to address the enormous challenge of using natural resource endowments to reduce poverty while protecting human rights and safeguarding the integrity of ecosystems. Mrs. Bruckner is an attorney licensed in Colorado, specializing in environmental law and policy, and international resources transactions law and policy. She develops and implements programs focused on sustainable development in extractive industries, including seminars that build the capacity of developing country governments to negotiate and manage natural resource development agreements; workshops to educate government, community and industry stakeholders about roles, rights and responsibilities in mine development initiatives; preparation of Validation Reports for the Extractive Industries Transparency Initiative (“EITI”); and university-based seminars and internship programs that build the skills of professional leaders around the globe to more sustainably manage natural resources. Prior to her work with SDSG, she utilized her background in social work, journalism, and economics to work collaboratively with governments and civil society organizations on international trade and development issues. Mrs. Bruckner is a graduate of the University of Denver Sturm College of Law, where she is now an adjunct professor teaching seminars on Global Climate Change Law and Policy, and Sustainable Development and International Trade.

1. DAVID BRERETON ET AL., GOOD PRACTICE NOTE: COMMUNITY DEVELOPMENT AGREEMENTS 1 (2011), http://www.eisourcebook.org/cms/files/csrmm_good_practice_notes_on_cdas_document_final_260911.pdf.

2. *Id.* at 5.

impacts, address grievances, and manage the distribution of benefits in a fair and equitable manner.³ CDAs are increasingly viewed as an important mechanism for preventing and managing conflict in natural resource development.⁴

Section II of this article will discuss the growing demand for minerals that is driving mineral development. Section III will describe the importance of a “social license to operate”⁵ and the costs of conflict to mineral developers. Section IV will discuss major international frameworks that relate to the company-community relationship. Section V will focus on trends in use, the agreement process, and content of CDAs. While this article will focus primarily on use of CDAs in mining projects, as they are increasingly common, CDAs are also prevalent in the agricultural sector and are applicable to other natural resource sectors.

II. GROWING DEMAND FOR MINERALS

The human species share a planet with limited nonrenewable mineral resources and seemingly limitless demand for those resources. As Earth’s human population grows by the minute—currently in excess of 7.3 billion and expected to exceed 11 billion by 2100⁶—demand for the many mineral components required for housing, transportation, communications devices, and other goods ranging from necessities to luxury items is on the rise. In 2015, the Minerals Education Coalition (“MEC”) estimated that every person in the United States uses 39,543 pounds of new minerals per year.⁷ MEC also estimated that each person born in the United States will utilize *3.11 million* pounds of minerals, metals, and fuels over the span of his or her lifetime.⁸ The lifetime estimated use of minerals is detailed in the table below.

Estimated Minerals Used in the Lifetime of One U.S. Baby Born in 2015⁹

Mineral Commodity	Amount Required Over a Lifetime
Aluminum (bauxite)	5,214 pounds

3. *Id.*

4. *Id.* at 4.

5. See generally THE WORLD BANK SUSTAINABLE ENERGY – OIL, GAS, AND MINING UNIT [SEGOM], MINING COMMUNITY DEVELOPMENT AGREEMENTS: SOURCE BOOK ix, SEGOM Doc. 71299, (Mar. 2012),

<https://openknowledge.worldbank.org/bitstream/handle/10986/12641/712990WP0minin00Box370065B00PUBLIC0.pdf?sequence=1&isAllowed=y> [hereinafter MINING COMMUNITY DEVELOPMENT] (explaining that a social license to operate is obtained by gaining community support for a project).

6. *World Population Prospects: The 2015 Revision, Key Findings and Advance Tables 2* (U.N. Dept. of Econ. & Soc. Affairs, Population Div., Working Paper No. ESA/P/WP.241, 2015), http://esa.un.org/unpd/wpp/publications/files/key_findings_wpp_2015.pdf.

7. 2015 *Per Capita Use of Minerals*, MINERALS EDUC. COAL., <https://www.mineralseducationcoalition.org/sites/default/files/uploads/2015percapita.jpg> (last visited Dec. 16, 2015).

8. 2015 *Mineral Baby*, MINERALS EDUC. COAL., <https://www.mineralseducationcoalition.org/sites/default/files/uploads/2015baby.jpg> (last visited Dec. 16, 2015).

9. *Id.*

Cement	48,483 pounds
Clays	11,427 pounds
Coal	452,666 pounds
Copper	985 pounds
Gold	1.59 troy ounces
Iron Ore	26,010 pounds
Lead	903 pounds
Natural Gas	9.96 cubic feet
Other Minerals and Metals	56,016 pounds
Petroleum	72,115 gallons
Phosphate Rock	16,651 pounds
Stone, Sand, and Gravel	1.25 million pounds
Zinc	5.39 pounds

While the 2015 estimates reflect a reduction in use of *nonfuel* mineral commodities when compared to prior years,¹⁰ 3.11 million pounds is an increase of overall mineral use compared to prior years, and remains an enormous quantity of resources.

Development of natural resources is essential to meet even the most basic needs of modern societies and economies.¹¹ However, such development has historically been conducted in ways that perpetuate the “resource curse” in resource rich developing countries, too often resulting in increased corruption, income inequality, armed conflict, and environmental damage.¹² There is tension between the increasing demand for sustainable development, “development that meets the needs of the present without compromising the ability of future generations to meet their own needs,”¹³ and the increasing global demand for natural resources. Responding to this tension is perhaps the key challenge of our

10. Compare, for example, the estimates for 2008, which totaled 3.6 million pounds per person born in the U.S. (0.5 million pounds lower than the 2015 total estimate), but included significantly higher estimates for commodities such as cement (65,480 pounds); clays (19,245 pounds); phosphate rock (19,815 pounds); and stone, sand, and gravel (1.61 million pounds). See Mineral Info. Inst., *Process for Calculating the mii Baby*, MINERALS EDUC. COAL. (2008), <http://www.mineralseducationcoalition.org/pdfs/CalculationofmisBaby.pdf>.

11. Development and International Economic Cooperation: Environment, Rep. of the World Comm’n on Env’t and Dev.: Note by the Secretary General, G.A. Res. 42/427, 42nd Sess., U.N. Doc. A/42/427, at 66 (Aug. 4, 1987) [hereinafter *Economic Cooperation*].

12. See Jeffrey Frankel, *The Natural Resource Curse: A Survey of Diagnoses and Some Prescriptions* 19 (Harvard Univ., John F. Kennedy Sch. of Gov’t, Working Paper No. RWP12-014, 2012), https://dash.harvard.edu/bitstream/handle/1/8694932/RWP12-014_Frankel.pdf?sequence=1; See also Terra Lawson-Remer & Joshua Greenstein, *Beating the Resource Curse in Africa: A Global Effort*, 3 AFRICA IN FACT 21 (Aug. 1, 2012), <http://www.cfr.org/africa-sub-saharan/beating-resource-curse-africa-global-effort/p28780>.

13. Economic Cooperation, *supra* note 11, at ch. 2, ¶ 1.

time. As explained in the section below, when not properly managed on a community level, such tensions may grow into costly conflict.

III. THE IMPORTANCE OF A "SOCIAL LICENSE TO OPERATE" AND THE COSTS OF CONFLICT

Mineral commodities are sourced from all over the world, on a planet where opportunities to extract minerals in areas with no human activity are becoming increasingly scarce.¹⁴ This reality increases the likelihood of company-community interaction and conflict, and signals a greater need to understand and utilize mechanisms such as CDAs to increase company-community communication and manage impacts.¹⁵

Developers are often concerned that negotiating company-community agreements will be costly and time consuming, particularly in the early stages of a natural resource development project.¹⁶ However, research on this topic shows that ignoring such investments can be even more costly, leading to temporary or permanent work stoppage; widespread community conflict; and reputational risks to investors, developers, host governments, and the resource sector as a whole (as has been experienced in mining, petroleum, palm oil, logging and other sectors).¹⁷

Examples of financial loss due to social conflicts have been particularly significant in the mining sector. For example, in 2012, at Newmont's Minas Conga Copper-Gold Project in Peru, demonstrations by local community members to stop the project resulted in losses of U.S. \$2 million per day.¹⁸ In 2014, the Lonmin Mine in South Africa, the source of nearly eighty percent of global Platinum Group Metal ("PGM") resources, experienced a widespread strike that led to a forty-three percent drop in production at Lonmin.¹⁹ The impacts were felt across the PGM sector in South Africa, where Lonmin, Anglo American Platinum, and Impala Platinum lost a collective 18.6 billion rand (U.S. \$1.7 billion) in revenues as a result of the strikes.²⁰

Such reports are leading academic institutions to study the costs of conflict.

14. Diane Toomey, *Global Scarcity: Scramble for Dwindling Natural Resources*, YALE ENV'T 360 (May 23, 2012), http://e360.yale.edu/feature/global_scarcity_scramble_for_dwindling_natural_resources/2531/.

15. Victoria Tauli-Corpuz, *The Private Sector: An Ally in Securing Indigenous Land Rights?* THOMSON REUTERS FOUND. (Mar. 14, 2016), <http://news.trust.org/item/20160314172106-d0u9b/?source=hpblogs>

16. INT'L ALERT, CONFLICT-SENSITIVE BUSINESS PRACTICE: GUIDANCE FOR EXTRACTIVE INDUSTRIES sec. 4, issue 1 at 2-3 (Mar. 2005), http://www.iisd.org/pdf/2005/security_conflict_sensitive_business.pdf.

17. *Id.* at 3-4.

18. Alex Emery, *Newmont Cutting Jobs at Suspended Peruvian Gold Project*, BLOOMBERG BUS. (Mar. 14, 2012), <http://www.bloomberg.com/news/articles/2012-03-14/newmont-cut-jobs-at-suspended-conga-project-santa-cruz-says>.

19. *Lonmin Fires 235 Striking Workers at S. Africa Platinum Mine*, NEWS 24 BOTSWANA (May 19, 2014), <http://botswana.news24.com/Regional-News/Lonmin-fires-235-striking-workers-at-SAfrica-platinum-mine-20140519-3>.

20. *Id.*

In a comprehensive study, the Centre for Social Responsibility in Mining at the University of Queensland found that the cost of conflict in the extractive sector is up to U.S. \$10,000 per day during initial exploration, up to U.S. \$50,000 per day during advanced exploration, and up to U.S. \$20 million per week during operations.²¹

At the University of Pennsylvania's Wharton School, Professor Witold Henisz led a study that tracked the market valuation for twenty-six gold mines owned by nineteen publicly traded firms listed on the Toronto Stock Exchange between 1993 and 2008, using an index of the degree of stakeholder cooperation or conflict for these mines.²² The key finding was that *two-thirds* of the market capitalization of these firms was a function of the firm's stakeholder engagement practices, whereas only one-third of the market capitalization was a function of the value of gold in the ground.²³

While developers traditionally focused primarily on finding a good ore deposit, obtaining the necessary legal rights to minerals, and securing the necessary permits to mine, there is now increasing pressure for companies to obtain and *maintain* a "social license to operate"—the acceptance and approval of local communities for the operation to proceed.²⁴ Although Anglo American, one of the world's largest mining company, has yet to make a public statement to this effect, it is reasonable to ascertain that its lack of a social license to operate and the expectation that this would lead to increased social and political risks led to the company's decision to pull out of the Pebble Mine project in the U.S. State of Alaska.²⁵ Prior to its withdrawal from the project, Anglo American had invested six years and over U.S. \$541 million to develop a site noted as "the planet's richest undeveloped gold deposit."²⁶ The company's CEO, Mark Cuifani, explained that the decision, made prior to completion of the formal permitting process for the mine, was not based on a reassessment of Pebble Mine's potential, but on internal efforts to "prioritize capital to projects with the highest value and lowest risks."²⁷ The mine was the subject of intensive local, national, and international opposition, primarily pointing to the impacts the mine would have on salmon fisheries in Alaska's Bristol Bay and on the local predominately Native American communities in the areas that rely upon those fisheries to sustain their

21. Daniel Frank et al., *Conflict Translates Environmental and Social Risk into Business Costs*, UNIV. OF QUEENSL. AUSTRAL., CTR FOR SOC. RESPONSIBILITY IN MINING 3 (Mar. 19, 2014), <https://www.csr.uq.edu.au/news/conflict-costs>.

22. *When Engaging with Your Stakeholders is Worth Its Weight in Gold*, KNOWLEDGE@WHARTON (Jul. 20, 2011), <http://knowledge.wharton.upenn.edu/article/when-engaging-with-your-stakeholders-is-worth-its-weight-in-gold/>.

23. *Id.*

24. See MINING COMMUNITY DEVELOPMENT, *supra* note 5, at ix.

25. Brad Wieners, *Why Miners Walked Away from the Planet's Richest Undeveloped Gold Deposit*, BLOOMBERG BUS. (Sept. 27, 2013), <http://www.bloomberg.com/bw/articles/2013-09-27/why-anglo-american-walked-away-from-the-pebble-mine-gold-deposit#p1>.

26. *Id.*

27. *Id.*

livelihoods.²⁸ The U.S. Environmental Protection Agency received over 670,000 public comments²⁹ about the project.

The studies and examples noted in this section underscore the need to place the social license to operate at the same, if not greater, level of importance as other legal rights and permits. The findings of these and other studies increasingly point to the importance of engaging with communities and building company-community relationships as the means to avoid conflict and maximize benefits to all parties involved. As discussed in the next section, international frameworks increasingly incorporate requirements for such community engagement and relationship building.

IV. INTERNATIONAL FRAMEWORKS AND THE COMPANY-COMMUNITY RELATIONSHIP

Due in part to examples like those noted in the section above, major lenders in the minerals sector require adherence to a range of international standards like the Equator Principles³⁰ and International Finance Corporation ("IFC") Performance Standards on Environmental and Social Sustainability,³¹ which set out rigorous standards for consultation and interaction with communities, as well as standards for environmental assessment and management. This section will describe these and other major international frameworks that apply to the minerals sector.

A. International Finance Corporation Performance Standards on Environmental and Social Sustainability

The IFC Performance Standards require IFC investment and advisory clients to assess and manage environmental and social risks and impacts *throughout the life* of a project, including requirements for "engagement between the client, its workers, local communities directly affected by the project (the Affected Communities) and, where appropriate, other stakeholders."³² This requirement derives from Performance Standard 1, which supports use of a grievance mechanism to facilitate early indication and prompt remediation of project-related grievances, and urges business to respect human rights.³³

IFC Performance Standard 1 also promotes a broad and inclusive engagement

28. *Id.*

29. For public comments and hearing transcripts, see Determinations: Restriction on Use of an Area as a Disposal Site; Pebble Deposit Area, Southwest Alaska; Hearings, 79 Fed. Reg. 42314 (July 21, 2014).

30. See *Equator Principles III*, EQUATOR PRINCIPLES (June 2013), http://www.equator-principles.com/resources/equator_principles_III.pdf.

31. See INT'L FIN. CORP., IFC PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY (Jan. 1, 2012), http://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afd998895a12/IFC_Performance_Standar%20ds.pdf?MOD=AJPERES [hereinafter IFC PERFORMANCE STANDARDS].

32. *Id.* at 5, n.1 (explaining that "other stakeholders" are "those not directly affected by the project but that have an interest in it. These could include national and local authorities, neighboring projects, and/or nongovernmental organizations.").

33. *Id.* at 6.

process with a range of stakeholders, including women, youth, disadvantaged and vulnerable groups.³⁴ Performance Standard 1 states that risks, impacts, and opportunities related to the project should be disclosed and provided to Affected Communities, and requires a consultation process where any adverse risks and impacts are identified.³⁵ The consultation must include opportunities for Affected Communities to express their views on project risks, impacts, and mitigation measures, tailored to the language preferences and decision-making processes of Affected Communities.³⁶

IFC Performance Standard 7 describes requirements related specifically to Indigenous Peoples affected by a project, including an *ongoing relationship* based on Informed Consultation and Participation (“ICP”) with the Indigenous Peoples affected by a project *throughout the project’s lifecycle*.³⁷ The IFC Performance Standards also require “Free Prior and Informed Consent” (“FPIC”) of Affected Communities of Indigenous Peoples, *with evidence of agreement*.³⁸

While there is no universally accepted definition of FPIC, the IFC Performance Standards explain that FPIC builds on and expands the requirements of ICP and is “established through good faith negotiation between the client and the Affected Communities of Indigenous Peoples.”³⁹ Developers must document “(i) the mutually accepted process between the client and Affected Communities of Indigenous Peoples, and (ii) evidence of agreement between the parties as the outcome of the negotiations,” but are not required to obtain unanimous acceptance of all individuals or groups within the community.⁴⁰

B. The Equator Principles and Other Applications of the IFC Performance Standards

The Equator Principles, based on the IFC Performance Standards, comprise a comprehensive “risk management framework, adopted by financial institutions, for determining, assessing and managing environmental and social risk in projects.”⁴¹ To date, eighty-two financial institutions in thirty-six countries have adopted the Equator Principles, covering over seventy percent of international project finance debt in emerging markets.⁴² All thirty-two Organizations for Economic Co-Operation and Development (“OECD”) Export Credits Agencies benchmark private sector projects against the IFC Performance Standards.⁴³ Additionally, the

34. *Id.* at 14.

35. *Id.* at 12-14.

36. *Id.* at 14.

37. *Id.* at 47.

38. *Id.* at 49.

39. *Id.*

40. *Id.*

41. *About the Equator Principles*, EQUATOR PRINCIPALS, <http://www.equator-principles.com/index.php/about-ep> (last visited Feb. 28, 2016).

42. *Id.*

43. *Equator Principles Financial Institutions*, INT’L FIN. CORP., http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Partnerships/Equator+Principles+Financial+Institutions/ (last visited Feb. 28, 2016); for a list of

Multilateral Investment Guarantee Agency ("MIGA") applies the IFC Performance Standards in its operations,⁴⁴ as well as the World Bank, which applies the IFC Performance Standards to projects supported by the International Bank for Reconstruction and Development/International Development Association that are "owned, constructed and/or operated by the private sector."⁴⁵ This widespread adoption of the IFC Performance Standards arguably makes them the leading set of environmental and social standards on the planet.

C. *The World Bank Safeguard Policies*

The World Bank Safeguard Policies, which apply when developing country governments turn to the World Bank for loans to support infrastructure and other development projects, were established to help "identify, avoid, and minimize harms to people and the environment."⁴⁶ The safeguards lay out requirements for borrowing governments to address environmental and social risks, such as conducting environmental and social risk assessments, consultation with affected communities, and restoring the livelihoods of displaced people, as eligibility requirements for project financing.⁴⁷ The World Bank is currently revising the Safeguard Policies, including a public consultation process that will close on March 16, 2016.⁴⁸ The revision aims to provide a more efficient and clear set of standards, which are expected to include expanded requirements for FPIC and stakeholder engagement, but may result in less stringent requirements in other areas.⁴⁹

D. *The United Nations Guiding Principles on Business and Human Rights*

The United Nations Guiding Principles, known as the "Ruggie Principles," after John Ruggie, the U.N. Secretary-General's Special Representative for Business and Human Rights who led development of the Guiding Principles, and also known as the "Protect, Respect and Remedy" framework after its key themes of "State Duty to Protect" human rights, "Corporate Responsibility to Respect" human rights, and "Access to Remedy" for people harmed by business activities,

participating organizations, *see also* *Official Export Credits Agencies*, OECD, <http://www.oecd.org/tad/xcred/eca.htm> (last visited Feb. 28, 2016).

44. *See Equator Principals Financial Institutions*, *supra* note 43.

45. *Id.*

46. *Safeguard Policies*, THE WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFEPOL/0,,menuPK:584441~pagePK:64168427~piPK:64168435~theSitePK:584435,00.html> (last visited Feb. 28, 2016).

47. *Id.*

48. *Review and Update of the World Bank Safeguard Policies*, THE WORLD BANK, <http://consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies> (last visited Feb. 28, 2016).

49. *See* SUSTAINABLE DEVELOPMENT STRATEGIES GROUP, COMMENTS TO THE WORLD BANK ON THE PROPOSED CHANGES TO THE SAFEGUARD POLICIES, https://consultations.worldbank.org/Data/hub/files/sdsg_safeguard_policies_comments.pdf (last visited Apr. 20, 2016).

detail requirements for engagement and consultation with communities, including requirements for culturally relevant grievance mechanisms.⁵⁰ Complete with a helpful implementation guide, the U.N. Guiding Principles offer clear guidance for governments, business, and other stakeholders who wish to increase community engagement and reduce conflict in mining and other natural resource development projects.⁵¹

E. Incorporation of International Standards in Mine Development Contracts

Leading examples of mining contracts between companies and host governments now include requirements to adhere to international standards that promote sustainable development. One publicly accessible example is the International Bar Association's Model Mine Development Agreement ("MMDA"), which includes adherence to guidance provided in the IFC Performance Standards in its definition of "good industry practice."⁵² The MMDA also includes a separate clause regarding the Applicability of the IFC Performance Standards and Equator Principles that states, "Where Applicable Law and regulations on environmental and social impact assessment and management, and pollution prevention are less stringent than the IFC Performance Standards, the Company shall undertake its activities in a manner consistent with the IFC Performance Standards."⁵³ Inclusion of such standards may influence clauses on subjects such as environmental and social impact assessment and management plans, community engagement and information sharing requirements, FPIC requirements, local community development plans, local business development plans, and requirements for negotiation of one or more CDAs in the MMDA and other mining contracts that incorporate leading international standards.

The negotiation and implementation of CDAs in particular is one approach to adhering to stakeholder engagement and other requirements within international standards noted in this section. The next section will further discuss current trends in use and content of CDAs.

V. TRENDS IN USE, AGREEMENT PROCESS, AND CONTENT OF COMMUNITY DEVELOPMENT AGREEMENTS

As demand for increased community engagement and greater community benefits from mining builds from mine-impacted communities to the boardrooms of the IFC, the expectations for CDAs, or agreements between companies and communities to manage the impacts and benefits of mining, have soared.⁵⁴ CDAs

50. See generally, Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. HR/PUB/11/04 (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

51. *Id.*

52. *Model Mining Development Agreement Project*, INT'L BAR ASS'N § 1.1 (Mar. 29, 2011), <http://www.mmdaproject.org/?p=1417>.

53. *Id.* §10.2.

54. See Kendra E. Dupuy, *Community Development in Mining Laws, 1993 – 2012*, 1

are now *modus operandi* in many minerals rich parts of the world.⁵⁵ Institutions such as The World Bank, major nongovernmental organizations such as the Natural Resource Governance Institute, research institutes at major academic institutions such as Columbia University's Columbia Center on Sustainable Investment, and a growing number of national governments have become proponents of various types of investor-community agreements, particularly in mining projects.⁵⁶

CDAs, also widely known as "Impact Benefit Agreements," as well as by many other names,⁵⁷ aim to develop mutually beneficial relationships between companies, communities, and other stakeholders, while delivering mutually rewarding sustainable benefits from the mining projects.⁵⁸ CDAs are utilized where national or subnational laws require them, and are also often used voluntarily by investors and communities who understand the benefits of CDAs.⁵⁹

A. Use of Community Development Agreements around the Globe

Requirements for CDAs are increasingly common around the globe. In Canada, the Nunavut Land Claims Agreement Act requires an Inuit Impact and Benefit Agreement,⁶⁰ and in Canada's North West Territories, various agreements between First Nations and the government require company-community agreements.⁶¹ Other countries that require CDAs include Guinea (Mining Code 2011, Art. 130)⁶²; Kenya (Mining Bill 2014, Sec. 45(2)(f–g) and Natural Resources Benefit Sharing Bill)⁶³; Mozambique (Mining Law 2014)⁶⁴; Nigeria (Minerals and Mining Act 2007, Sec. 116)⁶⁵; Papua New Guinea (Mining Act 1992)⁶⁶; Sierra

EXTRACTIVE INDUS. & SOC'Y 200 (2014); *see also id.* at 202 (noting in particular Dupuy's graph, "Cumulative Adoption of Community Development in Mining Laws, 1985–2012").

55. *See generally id.*

56. For an example of The World Bank's view on CDAs, *see* MINING COMMUNITY DEVELOPMENT, *supra* note 5, at ix–x. For an example of Columbia University's Columbia Center on Sustainable Investment view on CDAs, *see* Jennifer Louitt, et al., *Emerging Practices in Community Development Agreements*, COLUM. CTR. ON SUSTAINABLE INV., Feb. 2016.

57. *See, e.g.*, MINING COMMUNITY DEVELOPMENT, *supra* note 5, at 5 (listing other names for CDAs, in addition to "Impact Benefit Agreements," include: Voluntary Agreements, Partnership Agreements, Participation Agreements, Impact Benefit Agreements, Community Contracts, Landowner Agreements, Investment Agreements, Shared Responsibility Agreements, Exploration Agreements, Benefits Sharing Agreements, and Empowerment Agreements, just to name a few).

58. *Id.*

59. *Id.* at 9–10.

60. Nunavut Land Claims Agreement Act, S.C. 1993, c. 29, art. 26, (Can.).

61. Marcela Duque Penagos et al., *Requirements for Community Development in Mining Laws*, COLUM. CRT. ON SUSTAINABLE INV. (Nov. 2014), <http://ccsi.columbia.edu/files/2015/01/Community-Development-Requirements-in-Mining-Laws-Matrix-November-2014-.pdf>.

62. Code Miner de la Republique de Guinee (2011) Cap. 3 § 130 (Guinea).

63. The Natural Resources (Benefit Sharing) Bill (2014) Cap. 5 § 28 (Kenya); The Mining Bill (2014) KENYA GAZETTE SUPPLEMENT No. 28 § 45(2)(g).

64. *See generally* Ministry of Mineral Resources and Energy Mining Law (2002), (Mozambique).

65. Nigerian Minerals and Mining Act (2007) Cap. (A5), § 116 (Nigeria).

66. *Mining Act and Regulation 1992*, (Papua New Guinea).

Leone (Mining and Minerals Act 2009)⁶⁷; South Sudan (Mining Bill 2012, Arts. 68(2), 80(1)(c), and 128(1))⁶⁸; and Yemen (Law No. 24 of 2002 Law of Mines and Quarries, revised in 2007, updated in 2010 as the Law No. 22 Concerning Mines and Quarries).⁶⁹ Egypt, Eritrea, and Mongolia are among the growing list of countries that have introduced legislation that would require CDAs.⁷⁰

Numerous other countries have legislation that requires investors to provide a community development fund, plan, royalty share, or some type of corporate social responsibility initiative to benefit local communities.⁷¹ This paper is limited to discussion of negotiated CDAs, which may result in a fund, community development plan, other management plan, or benefit as part of the agreement. However, it is remarkable that requirements for some type of community development in mining laws, including but not limited to CDAs, has been on the rise over the last thirty years, particularly within the last decade.⁷²

As noted above, CDAs may also be implemented voluntarily in countries where they are not currently required by law.⁷³ In Australia, Impact Benefit Agreements are commonly negotiated between indigenous Australians and mining companies.⁷⁴ Ghana is another example of a country where CDAs are widely utilized in mining projects, but are often implemented voluntarily, not as a requirement under national law.⁷⁵ In the United States, CDAs are not required, nor are they frequently utilized, but the Stillwater Mining Company and the local communities of Stillwater and Sweet Grass Counties in Montana have used a legally binding agreement between the company and communities since 2000.⁷⁶ CDAs have also been utilized in Greenland,⁷⁷ Laos,⁷⁸ and Mongolia.⁷⁹

Whether developed under national or subnational requirements, or as

67. The Mines and Minerals Act (2010) (Sierra Leone).

68. Law No. 36 of 2012 (Law on Mining) *Mining Act*, (South Sudan).

69. Law No. 22 of 2010 (Concerning Mines and Quarries), (Yemen).

70. Kristi Disney, Community Leadership and Participation in Energy Development Projects, SUSTAINABLE DEV. STRATEGIES GRP. Oct. 10, 2015, http://www.law.du.edu/documents/ved-nanda-center/Disney_Community_Participation.pdf ; see also THE WORLD BANK, MINING COMMUNITY DEVELOPMENT AGREEMENTS – PRACTICAL EXPERIENCES AND FIELD STUDIES 16 (2010).

71. See Dupuy, *supra* note 54; Penagos, *supra* note 61.

72. See Dupuy, *supra* note 54.

73. *Id.*

74. See Ciaran O’Faircheallaigh, *An Australian Perspective on Impact and Benefit Agreements*, 25 NORTHERN PERSPECTIVES, (1999–2000), <http://www.carc.org/pubs/v25no4/4.htm..>

75. See *The Ghanaian Experience*, SUSTAINABLE DEV. STRATEGIES GRP., <http://www.sdsgr.org/archives/cda-library/> (last visited Feb. 1, 2016) (displaying examples of Ghanaian CDAs in the Sustainable Development Strategies Group CDA Library).

76. See *Good Neighbor Agreement*, N. PLAINS RES. COUNCIL, <https://www.northernplains.org/issues/good-neighbor-agreement/> (last visited Feb. 1, 2016).

77. See generally *Greenland*, COLUM. CTR. ON SUSTAINABLE INV., <http://ccsi.columbia.edu/work/projects/greenland-2/> (last visited Feb. 1, 2016).

78. See generally *Laos*, COLUM. CTR. ON SUSTAINABLE INV., http://ccsi.columbia.edu/work/projects/cda_laos/ (last visited Feb. 1, 2016).

79. See *The Mongolian Experience*, CDA Library, SUSTAINABLE DEV. STRATEGIES GRP., <http://www.sdsgr.org/archives/cda-library/> (last visited Feb. 1, 2016).

voluntary initiatives, most CDAs are difficult for the public to access because they often contain confidentiality clauses or have not been made accessible to the public for other reasons.⁸⁰ In some cases, community members who should benefit from the agreements are unable to access the agreed documents—presenting a major obstacle for agreement's implementation.⁸¹ However, the Agreements, Treaties and Negotiated Settlement Project,⁸² IBA Research Network,⁸³ Columbia Center on Sustainable Investment,⁸⁴ Sustainable Development Strategies Group,⁸⁵ and others are working to make more CDAs available to the public, so that they may be better understood by companies, communities, and other stakeholders, and aid the process of improving future CDAs. What is known about CDAs is based on the limited number of public agreements, and the practical experiences of experts and stakeholders who have studied or had direct experience with CDAs. The World Bank and other institutions have published helpful guidance documents on CDAs.⁸⁶

B. Agreement Process

The greatest benefit of CDAs may be in the process itself. The process is a multi-year, multi-layered, and complex effort that requires experienced professionals from a variety of disciplines such as anthropology and social sciences, economics and accounting, and law and policy, among others.⁸⁷ The investment of time and effort, however, leads to the advantages of increased stakeholder capacity and engagement; improved relationships between the company and affected communities; identification of shared interests; improved abilities for the parties to manage change and quickly address grievances *before* they escalate into major conflicts; and long-term sustainable benefits.⁸⁸

The CDA process should begin early in the mining life cycle, during the pre-feasibility and exploration phases, and well before the construction phase.⁸⁹ The early stages of a mining project often seem like a difficult time for companies to make social investments: initial expenses are high and profit from mineral development has not yet been made, resulting in a negative cash flow.⁹⁰ Balancing

80. See Jennifer Louitt, et al., *supra* note 56, at 2.

81. *Id.*

82. AGREEMENTS, TREATIES & NEGOTIATED SETTLEMENT PROJECT (ATNS) DATABASE, <http://www.atns.net.au> (last visited Feb. 1, 2016).

83. *List of Known IBAs*, IBA RESEARCH NETWORK, http://www.impactandbenefit.com/IBA_Database_List/ (last visited Feb. 1, 2016).

84. *Community Development Requirements: Mapping, Database and Issues at Stake*, COLUM. CTR. ON SUSTAINABLE INV., <http://ccsi.columbia.edu/work/projects/community-development-agreements-frameworks-and-tools/> (last visited Feb. 1, 2016).

85. *Community Development Agreements Library*, SUSTAINABLE DEV. STRATEGIES GRP., <http://www.sdsg.org/archives/cda-library/> (last visited Feb. 1, 2016).

86. *Id.*

87. See MINING COMMUNITY DEVELOPMENT, *supra* note 5, at 21.

88. See also *id.* at 8, Table 2.1 "Benefits of Community Development Agreements."

89. *Id.* at 15.

90. *Id.* at 51-54.

the demands of investors to quickly make a return on their investments with the need for increased social spending can be particularly difficult in these early stages.⁹¹ However, when faced with the potential costs noted in Section II of this paper—the cost of not having a social license to operate, and the cost of conflict—the investment of time and effort is clearly warranted. The IFC has also developed a freely accessible Financial Valuation Tool,⁹² which aids in assessing, targeting, and optimizing sustainability investments such as those required in the CDA process.

The World Bank describes the major stages of the CDA process as:⁹³

- Stakeholder Identification and Mapping;
- Participatory Stakeholder Engagement;
- Participatory Capacity Development and Assessment;
- Participatory Determination of Stakeholder Representatives and Councils;
- Participatory Negotiation of a CDA; and
- Monitoring, Evaluation, Reporting, and Review.

All phases begin early in the mine life cycle, by or within the exploration phase. With the exception of the negotiation phase, all phases proceed over the life of the mine and are ongoing.⁹⁴ While there is not sufficient space in this paper to cover each of these phases in detail, it is important to note that the process reflects many requirements found in the IFC Performance Standards⁹⁵ and other international frameworks discussed in the previous section of this paper. Particularly relevant to the CDA process is the need for a broad and inclusive engagement process with a range of stakeholders, including women, youth, disadvantaged and vulnerable groups.⁹⁶ The capacity building phase is also important and should begin prior to the negotiation process, to ensure that parties are well informed and prepared to negotiate.⁹⁷ While much of the capacity building process should focus on the community, companies also need support to improve their capacity to effectively communicate and collaborate with communities.⁹⁸ These fine-tuned social skills are often missing in the skill sets of mining professionals and their negotiation teams, who may have a high level of knowledge regarding mining technology, mathematics, geology, and legal frameworks, but may lack the ability to effectively communicate with communities

91. *Id.*

92. *Financial Valuation Tool for Sustainability Investments*, INT'L FIN. CORP., <http://www.fvtool.com> (last visited Feb. 1, 2016).

93. MINING COMMUNITY DEVELOPMENT, *supra* note 5, at 17.

94. *Id.*

95. See INT'L FIN. CORP., IFC PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY (Jan. 1, 2012).

96. *Id.* at 13-14.

97. See MINING COMMUNITY DEVELOPMENT, *supra* note 5, at 8.

98. *Id.*

who may speak a different language, have no means to travel, lack literacy, be exposed to risk from engaging with mining companies, or have a significantly different cultures.⁹⁹

Also critically important is the *negotiation process*—if CDA is merely a “boiler plate” agreement in which a community member who does not necessarily represent the interests of the community provides his or her signature, it is not truly a negotiated agreement and is likely to fail.¹⁰⁰ The community process of selecting trustworthy representatives who represent the interests of the community, with capacity to negotiate, and who engage in a legitimate negotiation, is instrumental to the success of the agreement.¹⁰¹ Ongoing stakeholder engagement, evaluation, reporting, and review are also of great importance to the process.¹⁰²

C. CDA Content

Traditionally, CDAs focused primarily on sharing of financial benefits, but modern CDAs are much more comprehensive, covering not only financial benefits, but also topics such as:¹⁰³

- Capacity building;
- Community participation in decision-making processes;
- Information sharing requirements and procedures;
- Local community development objectives and programs to meet those objectives;
- Local business development plans;
- Employment and training;
- Management and monitoring of community development programs and related funds;
- Dispute resolution and grievance mechanisms;
- Addressing environmental, social and economic conditions during and after mine closure, and the transition to a post-mining economy.

As noted above, the content of the CDA is a subject matter to be negotiated. National or subnational legislation, or the mine development agreement negotiated between the company and the host government may provide a list of broad areas to be covered in the CDA, but there should always be room for legitimate negotiations between the company and community that can address the unique interests and circumstances of particular communities. Parties may also conclude

99. See Joseph Foti & Lalanath de Silva, *A Seat at the Table: Including the Poor in Decisions for Development and Environment*, WORLD RES. INST.,3 (2010), <http://www.wri.org/publication/seat-table>.

100. See *Model Mining Development Agreement Project*, *supra* note 54, at V.

101. MINING COMMUNITY DEVELOPMENT, *supra* note 5, at 47.

102. *Id.* at 12-13.

103. For a more comprehensive list of CDA topics, see *Model Mining Development Agreement Project*, *supra* note 52, at Annex B, (describing community development agreement objectives).

multiple agreements related to the same project—one covering the objectives, management structure, and transparency of a community development fund, another regarding a local business development plan, etc.¹⁰⁴

Whatever benefits the CDA aims to provide, the agreement must include a process for fair distribution of benefits. Actual or perceived unequal distribution of benefits may lead to conflict among community members or between communities, impacting implementation of the CDA or even the mining project.¹⁰⁵ Including a role for the government is also important, particularly to ensure that the company does not duplicate or take on the role of government, and that there is a transition plan in place to sustain benefits during and after mine closure.¹⁰⁶

VI. CONCLUSION

The relationship between companies and communities is of increasing importance to the success or failure of mining projects. Inability to obtain or maintain a social license to operate can be costly or even stop a mining project from going forward. Lawyers and other professionals who provide advice to stakeholders involved in mining projects should be aware that such projects are not only about the immediate impacts and benefits, but also impact prospects for long-term sustainable development.

The expectations of mine impacted communities and major international policy frameworks now require much more than a one-off consultation with communities prior to mine development, but ongoing consultations and community engagement throughout the life of the mining project. One way to implement ongoing community engagement, manage complex impacts, and promote sustainable benefits related to a mining project is through use of CDAs. While national and subnational legislation increasingly require CDAs, companies and communities that understand the extraordinary benefits such agreements can offer often voluntarily negotiate CDAs. As more CDAs become publicly accessible, legal professionals and other academics and stakeholders will have opportunities to learn more about good practice in negotiating and implementing such agreements in mining and other natural resource sectors.

104. MINING COMMUNITY DEVELOPMENT, *supra* note 5, at 46.

105. *Id.* at 18.

106. *Id.* at 26.

